Supreme Court, U.S.
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92-1068

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

The City of South Sioux City, Nebraska,

A Nebraska Municipal Corporation, Petitioner

v.

Sioux City Foundry Company,

An Iowa Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals sitting in this diversity case correctly applied the doctrine of *Erie v Tompkins* when it held that the Nebraska legislature had granted South Sioux City an implied power to make a contract setting its customer electric rates, contrary to a Nebraska Supreme Court decision which holds that utility rate contracting power could not be granted by implication, but must be expressly granted instead.

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REPORTS OF DECISIONS

The decision of the District Court is not reported.

The decision of the Court of Appeals is reported at 968 F.2d 777.

JURISDICTION

Petitioners seek review of the Judgment of the United States Court of Appeals for the Eighth Circuit issued July 10, 1992. A timely petition for rehearing was filed with the Eighth Circuit and was denied by an order entered September 3, 1992.

The jurisdiction of the Supreme Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTES INVOLVED

Nebraska Revised Statutes 1943 (Reissue of 1991)

Section 16–201. General powers. Each city of the first class shall be a body corporate and politic and shall have the power …(4) to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers,….

Section 16–674. Acquisition of plants or facilities; condemnation; procedure. The mayor and city council shall have power to purchase or provide for, establish, construct, extend, enlarge, maintain, operate, and regulate for the city any such … electrical distribution facility, electric or other light works,….

Section 16–684. Construction; operation; location; eminent domain; procedure. When the system of … power,… shall have been adopted, and the people shall have

voted to borrow money to aid in the construction as aforesaid, the mayor and council may erect and construct and maintain such … power plant, …, make all needful rules and regulations concerning their use, and do all acts necessary for the … management and control of same not inconsistent with law, ….

STATEMENT OF THE CASE

Sioux City Foundry Company, an Iowa corporation, [SCF] brought this action for declaratory and injunctive relief and damages alleging that a contract made between SCF and the City of South Sioux City, Nebraska, a municipal corporation and city of the first class, [City] was valid and it had been breached by the City. The jurisdiction of the district court was invoked under 28 U.S.C. Sec. 1332 because of diversity of citizenship, the plaintiff being an Iowa corporation and the defendant being a Nebraska municipality.

Briefly, the contract dealt with the City, as a distributor of electric power, supplying electricity to SCF for a term of twenty three years. The agreement was the result of SCF ' s search for a site for a plant in 1968. The city council on Christmas Eve in 1968 at a special meeting passed a resolution approving a contract between the City and SCF. City at that time owned and operated, and continues to own and operate, its own electrical distribution system within the

City. [Nebraska is an all public power state.] The City buys wholesale power from a wholesale supplier, a public power district, and distributes the power to residents and businesses in the City.

SCF claimed that the City had breached the contract by the city council's action in declaring the contract null and void and placing SCF under the Large Light and Power rate classification, and that the City was estopped to deny the contract's validity.

A part of the approved contract established a procedure for setting rates for the electricity to be provided. This procedure was to be followed for the entire twenty-three year term of the contract. The rate setting procedure permitted the City to flow through to SCF certain, but not all, wholesale costs. Following the approval and execution of the contract in 1969, SCF constructed a foundry in the City. The parties operated under the contract until 1977.

The rate modification portion of the contract was amended in 1977 after the wholesale supplier substantially changed its method of allocating costs. The retail rate that resulted from applying the existing provisions in the 1969 contract increased the charges made by the City to SCF significantly. The parties altered the formula for determining the rate to be charged to SCF and extended the term of the contract until 2002 in an addendum signed in 1977.

In 1987 the City was advised by its consulting engineers that the rate being charged to SCF was insufficient to cover the City's costs in supplying the power to SCF. This resulted from increases in demand charges [a component of the total charge] made by the wholesale supplier, which increases could not be passed on to SCF because of restrictions in the contract. In March 1989 the engineers reported to the City that "For fiscal year 1988, the cost of service tto SCF was $537,004 compared to revenues received of $337,301." This requires that all other ratepayers within the City make up this deficiency because of the nature of municipal ownership of the electric utility.

At its meeting on April 4, 1989, after being advised by the city attorney, the city council passed a resolution declaring the contract with SCF "null and void" and placed SCF under the appropriate rate within the City's published rate schedule. The City then billed SCF under the "Large Light and Power" rate, which resulted in increased charges to SCF averaging $20,000 per month. No part of this additional charge has been paid by SCF, although there was testimony that the amounts had been placed in a separate bank account pending the result of the litigation.

SCF then filed this action. Upon motion by SCF, the district court entered a preliminary injunction preventing the City from attempting to collect the amounts due under the higher rates. SCE then moved for a summary judgment. The district court reversed its position and denied the motion for summary judgment and dissolved the preliminary injunction. The court determined that there was no specific statutory authority for the City to enter into a contract restricting its legislative power to set rates. The contract was, therefore,

ultra vires and void. SCF appealed from the order dissolving the preliminary injunction.

A panel of the Eighth Circuit Court of Appeals reversed the district court and found the contract to be valid. The Circuit Court panel determined that under Nebraska law the City had the "implied power to enter into long-term contracts with the City's electricity customers that include rate terms." The City petitioned for a rehearing en banc, which was denied by an Order dated September 3, 1992, with Judge Arlen Beam from Nebraska voting in favor of the rehearing.

REASONS FOR GRANTING THE WRIT

This Court has a primary interest in assuring that a federal court enforcing state law in a diversity case is, in effect, sitting as another court of the state. *Bernhardt v Polygraphic Company of America,* 350 U.S. 198, 203–204, 76 S.Ct. 273, 276–277, 100 L.Ed. 199 (1956). In this case, the district court

entered a reasoned judgment based on well–understood principles of Nebraska law that are consistent with the other states. The Court of Appeals reversed the district court on the basis of its interpretation of three Nebraska statutes, but its interpretation is directly contrary to a Nebraska Supreme Court decision which was in turn based on a decision of this Court. The Court of Appeals decision establishes precedent in Nebraska that will affect not only these litigants, but also the political subdivisions across the state.

Petitioner acknowledges that this Court normally defers to interpretations of state statute given by the lower federal courts, but this "rule is not ironclad…and (this court has) authority to differ with the lower federal courts as to the meaning of a state statute." *Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 500, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985). Moreover, the Court will grant certiorari to determine whether the doctrine of *Erie v Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) was correctly applied by the Court of Appeals. *Bernhardt v Polygraphic Company of America,* supra.

The Court of Appeals has erroneously interpreted Nebraska statutes in this case. In reversing the district court, it rejected South Sioux City's claim that its 1968 city council had not been empowered by the Nebraska legislature to make the disputed contract. The Court of Appeals based its decision on the premise that city authority to make the contract was "implied" by statutes that create a general city power to make contracts. This decision is directly contrary to the Nebraska Supreme Court's decision in *Marquis v Polk County Telephone Co.* 100 Neb. 140, 158 N.W. 927 (1916), in which the court held that a city's general power to make contracts does not imply that the city has the power to make a utility rate contract. The *Marquis* decision was in turn based on this Court's decision in *Home Telephone & Telegraph Co. v City of Los Angeles* 211 U.S. 265, 53 L.Ed. 176, 29 S.Ct. 50 (1908), holding that the authority of a city to surrender its utility rate regulatory power, by making a long–term rate contract, is not implied by the grant of general contract powers. These cases hold that such power, if it exists, must be expressly granted to the governmental subdivision by the

legislature. *Marquis*, supra., has not been reversed or modified. Thus the Nebraska law on this subject seemed, until now, to be settled.

This Court of Appeals decision will influence more than the claims of these parties. It will interact with the Court of Appeals ruling in *Nucor Corp. v Nebraska Public Power District*, 891 F.2d 1343 (8 Cir., 1989) to establish a new line of authority regarding the Nebraska public power systems. In *Nucor*, the Court upheld a federal jury verdict awarding money damages to an electric customer for breach of an electricity supply contract. In that contract the utility had agreed to follow statutory rate–making standards but did not fix the rate itself in the contract; no claim was made that the contract itself was invalid. The holding in this case is that political subdivisions have implied power to make customer rate contracts that fix the rates themselves, rather than merely incorporating by reference the utility's well understood duties to make fair, reasonable, and nondiscriminatory rates. Taken together, these two decisions mean that every public power entity in Nebraska now faces claims by electricity customers

asserting that their rates are fixed by contract, a matter which has heretofore been generally considered a legislative or regulatory function of the electric entities in this state. *McGinley v Wheat Belt Public Power District*, 214 Neb. 178, 332 N.W.2d 915 (1983).

The Court of Appeals reasoned as follows. Governmental subdivisions in Nebraska are granted either express or implied powers by the Legislature. South Sioux City has the general power to make contracts under Section 16–201(4), and the general power to own and operate an electric utility under Sections 16–674 and 16–684, Nebraska Revised Statutes 1943. These powers do not expressly declare that the city may make rate–fixing contracts with electric customers nor do they expressly forbid it. The Court of Appeals held that the power to make a customer rate–fixing contract was implied by these statutes granting the city these general powers. As a result, the contract in contention was upheld.

The flaw in this reasoning lies in its central principle that a governmental subdivision may have an "implied power" to

make a public utility rate contract "in the absence of conflicting legislation." (slip opinion p. 8) As petitioner has already stated, the Nebraska Supreme Court ruled in 1916 that the power to make a rate contract is not implied by a municipality's general contract powers or police powers. *Marquis v Polk County Telephone Co.,* supra. The law creating a municipality and conferring powers upon it, whether it is a home rule charter or enabling legislation, is a grant of power, not a limitation on power. *Consumers Coal v City of Lincoln* 109 Neb. 51, 189 N.W. 643 (1922). Cities only have the powers expressly granted to them, or necessarily implied in the grant; conversely, powers not granted are implicitly prohibited. *United Community Services v The Omaha National Bank* 162 Neb. 786, 77 N.W.2d 576 (1956) This body of Nebraska law is in direct conflict with the Court of Appeals holding in this case. The Nebraska Supreme Court has never held that Nebraska cities possess general powers "in the absence of conflicting legislation."

Nebraska's rules on municipal powers interact in this case with the law on utility rate regulation. As a general rule, the

power to establish rates to be charged the public for essential services resides initially in the State Legislature. *Munn v Illinois* 94 U.S. 113, 24 L.Ed. 77 (1876) The Legislature may delegate this power to a municipality but its decision to do so, particularly an asserted delegation of a power to make long–term rate rate contracts, must be clear and explicit. *Home Telephone & Telegraph Co. v City of Los Angeles,* supra.; *Railroad Commission of California v Los Angeles Ry. Corp.* 280 U.S. 145, 74 L.Ed. 234, 50 S.Ct. 71 (1929). Nebraska recognizes these rules, and adopted them in *Marquis,* supra. In doing so, the Nebraska Supreme Court recognized that changed circumstances might render a utility rate unfair to either the consuming public or the utility, and the existence of a rate–fixing contract might preclude appropriate regulatory action. *Marquis,* supra, 100 Neb. at 143. Thus, the Nebraska law requires that the power to make such a contract must be expressly delegated by the Legislature. And, contrary to the result reached by the Court of Appeals, no Nebraska statute expressly delegates this power to South Sioux City.

The Court of Appeals cited several Nebraska decisions as precedent for its ruling. But these cases involve either agreements with franchise utility companies, *City of University Place v Lincoln Gas & Electrict Light Co.*, 109 Neb. 370, 191 N.W.2d 432 (1922), or agreements with contracting parties for business matters that do not concern rates charged to the general public consumers of electric utility service.*T.V. Transmission v City of Lincoln* , 220 Neb. 887, 374 N.W.2d 49 (1985); *Carr v Fenstermacher*, 119 Neb. 172, 228 N.W. 114 (1929). None of them applied or interpreted the statutes on which the Court of Appeals relied, or any comparable statutes, to a claimed customer rate contract. Thus, these cases are distinct from this action, and do not establish precedent for the decision.

Much of the precedent in this area involves municipal regulation of utility companies, rather than a city's regulation of its own utility as in South Sioux City's case, and this point was a focus of attention in the lower courts. But that difference does not yield a different result. Cities regulating rates to be charged to the customers of a city–owned utility

are performing the same public regulatory function as cities regulating the rates charged by utility companies. *City of Seymour v Texas Electric Service Co.* 66 F.2d 814, 817 (5 Cir., 1933); *Connett v City of Jerseyville* 110 F.2d 1015, 1019 (7 Cir., 1940) In each instance, the public interest in fair utility rate regulation is the same, and thus the public policy concern that militates against long term rate–setting contracts is also the same.

In fact, agreements fixing rates for years are upheld when, by making the agreement, the municipality is able to induce a utility company to establish the community's service in the first place, *Omaha Water v City of Omaha*, 147 F. 1 (8 Cir., 1906); *St. Cloud Public Service v City of St. Cloud*, 265 U.S. 352, 44 S.Ct. 492, 68 L.Ed. 1050 (1924), or to arrange financing so the community itself can provide its utility service. *Scott Paper Co. v City of Anacortes,* 90 Wash.2d 19, 578 P.2d 1292 (Wash.Sup.Ct., 1978). Such agreements are not otherwise upheld, as the district court found in this action.

The change brought about by the Court of Appeals ruling will be immediate. In the early years of the contract, there were few problems regarding the rate, and these were apparently resolved in 1977. But since then city overhead costs have increased, and the city's wholesale electric supplier has changed its method of calculating its charges. The contract prevents the city from passing these along to this customer. The other electric customers, homeowners and businesses in the city, have to make up the difference by paying higher charges. This situation creates a subsidy to a private industry that is forbidden under the Nebraska Constitution, *Chase v Douglas County* 195 Neb. 838, 241 N.W.2d 334 (1976), and illegally forces one class of utility customer to subsidize another. *El Paso Electric v Federal Energy Regulatory Comm'n.* 667 F.2d 462, 468 (5 Cir., 1982)

Furthermore, the ruling creates new law for Nebraska governmental subdivisions. The Nebraska Supreme Court's narrow interpretation of the concept of implied municipal powers has historically meant that cities may not do many things which might be considered only possible, as opposed

to necessary. For example, a city was authorized by its charter to provide heat to its citizenry, but the Nebraska Supreme Court held that did not authorize it to sell heating fuel.*Consumers Coal v City of Lincoln,* supra. Another city was authorized by statute to illuminate its streets, but the Nebraska Supreme Court held that the statute did not authorize it to sell electricity to its citizens. *Christensen v City of Fremont* 45 Neb. 160, 63 N.W. 364 (1895). The Court of Appeals ruling in this case means that Nebraska's municipalities have implied powers to perform acts which are not objectively necessary to carry out city functions.

It is virtually impossible to draft legislation forbidding the exercise of all the powers someone may think are implied by a statute. At least it seems likely that Nebraska's public power industry faces the prospect of the assertion of implied contract restrictions on their regulatory powers by customers all over the state. State courts may be placed in the position of choosing whether to follow the Federal Court rule or the state court rule, a situation which ought not to exist. Litigants may seek a choice of forum based on these differing

interpretations of state law. These are among the consequences of this ruling, all of which go beyond its immediate impact to these litigants, and indicate the need for further examination of this case by this Court.

CONCLUSION

Because of its importance to the citizens of the City of South Sioux City, and to the public electric utility entities in Nebraska, the holding in this case should be reviewed on certiorari by this Court.

RESPECTFULLY SUBMITTED
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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

SIOUX CITY FOUNDRY COMPANY,	* CV 89-L-470
Plaintiff,	*
vs	*
CITY OF SOUTH SIOUX CITY,	*
NEBRASKA,	*
Defendant and	*
Counterclaimant,	*
ERNEST ALBERTSEN, et. al.,	*
Third Party	*
Defendants.	*

MEMORANDUM AND ORDER ON

PLAINTIFF'S MOTION FOR SUMMARY

JUDGMENT AND THIRD-PARTY DEFENDANTS'

MOTION FOR SUMMARY JUDGMENT

Facts

Sioux City Foundry (foundry) is an Iowa corporation with its foundry operations located in South Sioux City, Nebraska.

The City of South Sioux City (city) is a Nebraska municipal corporation and a city of the first class in Nebraska. The city owns and operates an electrical distribution system which purchases electricity at wholesale rates and sells it to consumers at retail rates.

At some time prior to and/or during 1968, the foundry decided, for environmental reasons, to build a plant with an electric furnace. A stable supply of electricity would be a prerequisite to operating such a plant. The city, desirous of attracting new industry, and the foundry, desirous of obtaining a cheap, reliable, long-term source of electricity, discussed locating the foundry on land within the city. The foundry and the city entered into negotiations for a long-term electricity rate contract. The negotiations led to the conclusion of a 23-year contract for electric light and power service that provided a formula by which the city could adjust the rate charged to the foundry should the rate the city paid for electricity change.

On December 24, 1968, city attorney Wayne Boyd presented the city council with a resolution approving the contract, and the city council voted to adopt the resolution. The contract was executed by then mayor Ernest Albertsen and then foundry president Milton Galinsky. Both parties performed under the contract until 1977, when it was amended to further clarify how the contract rate would be adjusted in the future. The addendum was more specific than the 1968 contract and described in detail how the city and foundry would agree on future rate increases. The 1977 addendum also extended the contract 25 years from 1977, to expire in 2002.

Wayne Boyd, the city attorney, represented the city and recommended to the city council that the addendum be approved. In September of 1977, the city council approved the addendum and on the 16th of that month, then mayor Keith Ferris and then foundry president Milton Galinsky executed the addendum.

The contract and addendum remained in effect and were adhered to by both parties until April 4, 1989, at which time

city attorney Wayne Boyd informed the city council that the contract and addendum abridged the city's legislative authority to set rates. The city council voted to approve a resolution declaring the parties agreement null and void, and placing the foundry under the established large light and power rate. Prior to the April 4, 1989, city council meeting, the council and various city officials had concluded, based on the report of an engineering consulting firm hired by the city, that the city was losing money under its contract and addendum with the foundry.

Since April 4, 1989, the foundry has been billed at the large light and power rate established by city ordinance. The foundry has been paying the city only that amount it calculates it owes under the contract rate. The foundry has been placing the disputed difference in what it calls an escrow account.

The city threatened to disconnect the foundry's electric service if its full electric bill was not paid, but the foundry obtained a preliminary injunction from this court prohibiting

the city from cutting off the foundry's power until this case is resolved.

The foundry's third amended complaint (filing 48) has four causes of action. The foundry seeks: (1) a declaratory judgment that the contract and addendum are valid, binding obligations, (2) a determination that the city breached the contract and addendum, (3) a determination that the city and certain of its officers violated the Nebraska Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq., (Reissue of 1987 & 1990 Cum. Supp.), and (4) a determination that the city is estopped from denying the validity of the contract and addendum.

The city has counterclaimed (filings 8 and 63) seeking in excess of one and a half million dollars that it claims is an underpayment for electric service provided to the foundry since 1969 that was not billed under the special foundry rate.

In response to the counterclaim, the foundry initiated a third-party action (filing 12) seeking indemnification and damages from various city officials and representatives for any costs,

fees, or judgments levied against them by virtue of the city's counterclaim. Furthermore, the foundry alleges the third-party defendants violated the Nebraska Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-302 et seq. (Reissue of 1987 & 1990 Cum. Supp.).

The foundry has filed a motion for summary judgment (filing 88) on it's first, second, and fourth causes of action. There is extensive deposition testimony from electrical engineering consultants who were hired by the city on or about 1986 or later to review the foundry rate, as well as deposition testimony from many relevant parties and nonparties to this suit.

Discussion

First and Second Causes of Action -- Are the Contract and Addendum Valid, Binding Obligations, and If So, Did the City Breach Them

It is a thoroughly settled principle of law that the regulation of rates for electricity, water, or some other utility, is a

legislative act, and one council may not, by contract or otherwise, deprive successive councils of such power. 12 McQuillin, Municipal Corporations (3d ed.) 607-09, § 35.37; 10A McQuillin, Municipal Corporations (3d ed.) 42-43, § 29.101; (council presently holding legislative or governmental powers "is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.") 56 Am. Jur. 2d Municipal Corporations §§ 154, (1971); ("a municipal contract will generally be declared void if there has been an abuse of power or discretion on the part of the municipal authorities executing it") Id. at § 495; (municipality cannot make contracts that will control its legislative duties or amount to an abrogation of its governmental function) 63 C.J.S. Municipal Corporations § 979c (1950); (governing body of a municipal corporation may not by contract bind its successors in their exercise of legislative functions) Id. at § 987.

There is no noteworthy disagreement in the courts with the above-mentioned rule. See, Springfield Gas & Elec. Co. v.

Springfield, 257 U.S. 66, 70 (1921) (municipality's setting of rates was held to be a legislative act); Jorgensen Co. v. City of Seattle, 665 P.2d 1328 (Wash. 1983), cert. denied, 464 U.S. 982 (1983) (municipality's setting of rates is a legislative act); Freeport Water Co. v. Freeport City, 180 U.S. 587, 598-99 (1901) ("power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant"); Connett v. City of Jerseyville, 110 F.2d 1015, 1019 (7th Cir. 1940) (municipal governing body, when fixing utility rates, performs public function as distinguished from private function as owner and operator of utility); San Francisco-Oakland Terminal Rys. v. City of Alameda, 226 F. 889, 891-92 (N.D. Cal. S.D. 1914) (statute conferring power upon city to regulate rates and not indicating a legislative purpose to restrict that power, shows that city was unauthorized to bind itself by contract); Johnson v. State of Georgia, 128 S.E.2d 651, 655 (Ga. App. 1962) (contract specifying electrical rates municipality must charge customer, as well as provisions by which rate can by raised to ensure system stays financially sound, held ultra vires and

void as fettering council's legislative discretion without express statutory permission).

While legislative councils cannot lawfully contract in such a manner as to bind the legislative abilities of subsequent councils, absent statutory language clearly allowing such contracts, councils can contract when acting in a proprietary manner. With the exception of setting rates, a municipal corporation generally acts in a proprietary manner in operating a municipal utility. Johnson, 128 S.E.2d at 654. Business contracts that do not infringe legislative rate regulation may be entered into by municipal corporations. City of Des Moines v. City of West Des Moines, 30 N.W.2d 500, 505 (Iowa 1948). Contracts abridging the legislative function of a governing body can validly exist, but only if authorized by statute. Id. at 507.

Municipal utilities may generally enter into contracts that are incident to municipal ownership of such a plant and which are necessary to render the system efficient and beneficial to the public. 12 McQuillin, Municipal Corporations (3d ed.)

562, § 35.32. See also, 10A McQuillin, Municipal Corporations (3d ed.) 43, § 29.101 (contracts for public utilities, i.e., electricity supply, are generally considered business affairs of the municipal utility). Specifically, a municipal corporation can contract to purchase electricity, 12 McQuillin at 562, § 35.32, and such a contract can extend beyond the term of office of the officers making the contract, subject only to a reasonable length of time. Johnson, 128 S.E.2d at 654.

The reasoning for allowing contracts to purchase electricity is based in the public interest. The Johnson court concluded that a long-term contract ensuring the supply of electricity was reasonable "in view of the fact that electricity must be in the wires at all times, ready to spring to service at the flick of a consumer's switch and counted upon to be available all the time it is being used." Id. See also, Sampson v. City of Cedar Falls, 231 N.W.2d 609, 613 (Iowa 1975) (city council, in contracting and binding future city councils in order to procure an adequate supply of electricity for consumers, executes a public function).

In Citv of Crosbyton v. Texas-New Mexico Utilities Co., 157 S.W.2d 418, 420-21 (Tex. Civ. App. 1942), a municipality validly contracted to procure power essential to the operation of its public utilities, but no attempt was made to regulate the rates. Such a contract validly precluded future administrations from contracting for or acquiring power from any other source. Id. at 420. In Omaha Water Co. v. City of Omaha, 147 F. 1 (8th Cir. 1906), appeal dismissed, 207 U.S. 584 (1907), the court found that the legislature "intended to grant, and did grant to the city of Omaha, by apt words and in unmistakable terms, the power to make an unalterable contract regarding the water rates." Id. at 13. The Eighth Circuit concluded that

> [t]he power to regulate rates of water, gas, transportation, and other public utilities partakes of the nature of a governmental and of a proprietary power whose exercise may be suspended for a reasonable time by express grant or by contract. An agreement for such a suspension will not be raised by mere implication. Where the meaning of a grant or contract regarding such a suspension or regarding

> any public franchise or privilege is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain it will be protected and enforced.

Id. at 12.

It is clear then that a municipal utility acts in a proprietary manner in most all of its functions, with the notable exception of its rate-making function. Rate-making is a legislative function that cannot be delegated away absent a specific statutory provision. A legislative body acts in a proprietary manner when it contracts to purchase a supply of electricity because it is acting in the best interests of its customers/citizens and not abridging any rate-making function. This is in contrast to a contract to sell a supply of electricity at a set price, which is a contract that could potentially conflict with the legislative body's statutory authority to regulate and fix rates. Such a contract is repugnant to the statute, the legislative body, and its citizenry.

Having concluded that the rate-making authority of a city council is a legislative act that cannot be contracted away absent specific statutory language, I now turn to the applicable Nebraska statutes that govern this case.

Neb. Rev. Stat. §§ 16-681 and 16-682 govern the issues raised here. Section 16-681 states, in relevant part, that

> "[s]uch city owning, operating or maintaining its own gas, water, power, light or heat system, shall furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, subject to reasonable rules and regulations, with gas, water, power light or heat. It shall regulate and fix the rental or rate for gas, water, power, light or heat . . .."

That section must be read in conjunction with the subsequent statutory provision, § 16-682, which states, in relevant part, that

> "Such cities shall have the right and power to tax, assess, and collect from the inhabitants thereof such rent or rents for the use and benefit of water, gas, power, light or heat

used or supplied to them . . . by such gas, light or heat system, as the council shall by ordinance deem just or expedient. . . ."

First, these statutes contain mandatory language in that they state such cities "shall" act in a certain manner. Such commanding language cannot be dismissed as permissive. Neb. Rev. Stat. § 49-802(1) states "[w]hen the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed." See, Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 589, 239 N.W.2d 779, 780 (Neb. 1976); Freeport Water Co., 180 U.S. at 600. Second, both statutes apply specifically to municipal utilities, as opposed to public utilities which are covered by other statutes, most notably § 16-679.[1] Third, and most importantly, the commanding

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[1] Neb. Rev. Stat. § 16-679 was discussed and distinguished in the memorandum and order on plaintiff's motion for a preliminary injunction of December 19, 1990, filing 73, p. 5-6.

language on which this case turns specifically gives the city the authority to "regulate and fix the rental or rate" (§ 16-681) as well as "the right and power to . . . assess, and collect . . . such rent or rents for the use or benefit of . . . power, light or heat used or supplied . . . as the council shall by ordinance deem just or expedient." (§ 16-682).

It is clear that the state legislature has given cities operating municipal utilities the authority to set the rates for such utilities, to adjust those rates as it sees fit and, by ordinance, collect those rates from ratepayers. I find no language "by apt words and in unmistakable terms," Omaha Water Co., 147 F. at 13, that would allow the city to bargain away its legislative functions, and "[a]n agreement for such a suspension will not be raised by mere implication." Id. at 12.

On the first cause of action, I find that the law, as applied to the facts in this case, makes it clear that the City of South Sioux City had no authority to enter into a rate-setting contract with the foundry. The 1968 contract and the 1977 addendum abridge the legislative authority of the city

council. The city, which can only negotiate away its legislative powers via an explicit statutory grant of authority, possesses no such authority. Therefore, as a matter of law, the contract and addendum are ultra vires. Warren v. Stanton County, 145 Neb. 220, 226-27, 15 N.W.2d 757, 761 (Neb. 1944); T.V. Transmission Inc. v. City of Lincoln, 220 Neb. 887, 893, 374 N.W.2d 49, 54-55 (Neb. 1985). Summary judgment on the plaintiff's first cause of action, that the contract and addendum be declared valid, binding obligations, must be denied.

As for the second cause of action, since the contract and addendum are void, the city cannot be held to have breached them. There can be no breach of contract without a valid contract to be breached. Summary judgment on the plaintiff's second cause of action, a determination that the city breached the contract and addendum, will be denied.

Fourth Cause of Action -- Equitable Estoppel

The foundry's fourth cause of action, which is the last issue in its motion for summary judgment, seeks a determination that the city is equitably estopped from denying the validity of the contract and addendum. The foundation for an estoppel cannot be an illegal and void contract. Warren, 145 Neb. 220, 227, 15 N.W.2d at 761. The Warren court quoted the United States Supreme Court for the proposition that "when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it . . . . [N]othing which has been done under it, nor the action of the court can infuse any vitality into it . . .." Id., citing Central Transportation Co. v. Pullman's Palace Car Co., 139 U.S. 24, 61 (1891).

Furthermore, and specifically relating to the case at bar, a municipal corporation that invalidates a contract it never had any authority to make cannot be estopped so as to validate

the contract. Warren, 145 Neb. 220, 229, 15 N.W.2d at 762. The Warren court also noted that "[a] municipality cannot be estopped to aver its incapacity to make a contract by receiving benefits thereunder. That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no capacity to make the contract or where it was made in express violation of law." Id., quoting 3 McQuillin, Municipal Corporations (2d ed.), § 1358. Plaintiff's reliance on Hammer v. Dept. of Roads, 175 Neb. 178, 120 N.W.2d so9 (Neb. 1963), is misplaced. While that case discussed the concept of estoppel as it relates to a municipal corporation, it does not involve an ultra vires contract made by a municipal corporation, a key fact in the case at bar.

Third-Party Defendants' Motion for Summary Judgment

Sioux City Foundry (the foundry), the third-party plaintiff, filed a third-party action (filing 12) seeking indemnification and damages from various former and present officials of the City of South Sioux City (the city), for any costs, fees, or judgments levied against them by virtue of the city's

counterclaim in this suit. The foundry alleges fraud and violation of the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-302 et seq. (Reissue of 1987 & 1990 Cum. Supp.), and the third-party defendants have filed a motion for summary judgment on both counts.

In Nebraska it is well settled that fraud cannot be based upon "misrepresentations of law or misrepresentations of matters of law. . .." Beltner v. Carlson, 153 Neb. 797, 802, 46 N.W.2d 153 (1951). The reasoning behind that rule is that everyone is presumed to know the law, both civil and criminal, and, at the very least, must take notice of it. Id. A person has no right to rely on the representations of another and will not be allowed to mount another's representations of law as a defense. Id. "As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely . . .." Id. See also, Abbott v. Abbott, 188 Neb. 61, 66, 195 N.W.2d 204 (1972).

Furthermore, one who deals with a governmental unit is "required to act with reference to the authority, limitations and restrictions imposed upon it by the legislation authorizing

the organization . . .." Lincoln & Dawson County Irrigation Dist. v. McNeal, 60 Neb. 613, 619, 83 NW 847, 849 (1900); Lindeman v. Calamus Irrigation Dist., 122 Neb. 1, 2-3, 238 NW 762, 763 (1931). While I note that there is some dispute over whether Milton Galinsky, the foundry's president, relied upon any representations made by any of the third-party defendants, his reliance or nonreliance does not excuse him or the foundry from knowing the law, especially when he is represented by counsel in potentially costly and important matters. The third-party plaintiff acknowledges in its brief that an action for fraud cannot be predicated upon representations of law, but states that a variety of exceptions have been recognized. The third-party plaintiff cites no cases to support these exceptions, nor have I been able to find any under Nebraska law. Therefore, the rule shall control.

Since the president of the foundry stated that he relied upon his own attorney, and not on anybody else, in negotiating with the city (deposition of Milton Galinsky, 17:8--18:14, 50:10--52:9, 53:12--55:19), I find that he cannot claim that the law was misrepresented to him by any third-party

defendant. For the same reason, I do not find that the parties were dealing with each other on unequal terms. The parties are all located in close proximity to the Iowa-Nebraska border and undoubtedly had dealings in both states. The foundry cannot now claim that as an Iowa corporation it is new to the law of Nebraska. The third-party defendants' motion for summary judgment on the issue of fraud will be granted.

The foundry also alleges the defendants violated the Nebraska Uniform Deceptive Trade Practices Act (the Act), Neb. Rev. Stat. § 87-302 et seq. (Reissue of 1987 & 1990 Cum. Supp.), specifically § 87-302(a)(5) which states

> A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she: . . . (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have . . ..

The nature and wording of the Act, and especially the 14 enumerated deceptive trade practices found at § 87-302, reveal that the act is concerned with such practices as they relate to goods and services. Representations as to the legal powers of a municipal government or a municipal utility do not conform to the relevant definition of goods and services. See, Neb. U.C.C. § 2105(1), defining "goods" as "all things . . . which are movable at the time of identification to the contract for sale . . .." I decline the third-party plaintiff's invitation to extend the Act so as to include the third-party defendants' actions in this case as deceptive trade practices. Neither the foundry nor I can find any legal support for such an argument. The third-party defendants' motion for summary judgment on the issue of violation of the Nebraska Uniform Deceptive Trade Practices Act is granted.

Conclusion

IT IS ORDERED, for the aforementioned reasons, the plaintiff's motion for summary judgment (filing 88) on the first, second, and fourth causes of action in the plaintiff's

third amended complaint (filing 48) is denied, and the third-party defendants' motion for summary judgment (filing 92), relating to the third-party plaintiff's third cause of action in its third amended complaint (filing 48), is granted.

Dated March 20, 1991.

BY THE COURT

WARREN K. URBOM
Senior United States District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2268NEL

Sioux City Foundry Company,	*
an Iowa Corporation,	*
	*
Appellant,	*
	*
vs.	*
	*
City of South Sioux City,	* Appeal from the
Nebraska, a Municipal Corporation,	* United States
	* District Court for the
	* District of Nebraska
Appellee,	*
	*
Ernest Albertsen; et. al.	*
Third-Party Defendants.	*

Submitted: December 12, 1991

Filed: July 10, 1992

Before MAGILL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

In 1968, Sioux City Foundry Company ("SCF") contracted with South Sioux City, Nebraska, to purchase electricity from the City owned utility at a special rate. In April 1989, after determining that the special rate was failing to cover its wholesale power costs, the City declared the contract null and void and began billing SCF at a significantly higher rate. SCF, a citizen of Iowa, brought this diversity suit to enforce

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*The HONORABLE DANIEL M. FRIEDMAN, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

the contract and appeals the district court's determination that the contract is ultra vires and unenforceable. Concluding that the contract was within the City's delegated powers, we reverse.

I.

In 1968, SCF wanted to build a new plant for its casting division, and South Sioux City was anxious to attract new industry. The City urged SCF to build the plant in South Sioux City and offered to provide electricity from its municipally owned distribution system at a favorable rate. Because it had no other power customer of comparable size, the City devised an appropriate large-user rate with the help of its wholesale supplier, Consumers Public Power District (CPPD).

At a meeting on Christmas Eve 1968, the City Council approved by resolution a contract under which the City would provide electricity to SCF's new plant at a Special Foundry Power Rate (the Foundry Rate). The contract term

was twenty-three years, the length of CPPD's franchise to supply power to the City. The contract included rate-escalation provisions permitting the City to pass on increases in its wholesale electricity costs. Following City Council approval, SCF announced that it would build the million-dollar plant in South Sioux City. The parties signed a written contract and SCF completed the plant in 1969.

The contract was substantially modified in 1977, reflecting the City's determination that the rate-adjustment provisions were inadequate. SCF agreed to increase the base rate and to amend the rate-escalation provisions, and the City agreed to extend the term of the contract until September 16, 2002. The Foundry Rate was adjusted annually in accordance with this 1977 addendum until 1989.

By the late 1980s, the Foundry Rate had become less favorable to the City because the demand charges it was paying to its supplier, now the Nebraska Public Power District, had escalated dramatically, while the City's demand charges to SCF were fixed for the length of the contract in the

1977 addendum.[1] Moreover, when more sophisticated meters were installed, the City determined that SCF's peak demand periods largely coincided with the City's, which increased the City's cost of power.[2]

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[1]The City's wholesale rate, like the Foundry Rate, consisted of "demand" and "energy" components. However, the demand component was a much larger proportion of the City's wholesale rate, which exacerbated the impact of the City incurring increasing wholesale demand charges after it agreed to a fixed demand charge in the Foundry Rate. Under the 1977 addendum, the rate escalation provisions apply only to the energy component of the Foundry Rate.

[2]In the last paragraph of the contract, SCF agreed "to cooperate with the city, whenever possible to prevent their demand peak from reaching its highest point at the same time as the city demand peak." The record does not reflect any effort by the City to enforce this clause.

In March 1989, City Attorney Wayne Boyd opined that the contract would be invalid if the City's consultant concluded that the Foundry Rate was "not fair, reasonable and adequate to return the cost of service to the City, with a reasonable return for capital, construction and payment of indebtedness."

That same month, the City's consultant reported that, "For fiscal year 1988, the cost of service [under the contract] was $537,004 compared to revenues received of $337,301." At a meeting on April 4, 1989, the City Council passed a motion declaring the SCF contract "null and void." The City then began billing SCF at the "Large Light and Power" rate contained in the City's 1982 general rate ordinance. SCF's electricity charges have been, on average, about $20,000 per month higher under this rate than under the Foundry Rate.

In response, SCF protested and commenced this action. SCF's amended complaint seeks declaratory and injunctive relief and damages, alleging that the contract is valid, that the City breached the contract by declaring it null and void and by unilaterally implementing the Large Light and Power rate,

and that the City is estopped to deny the contract's validity. Following an evidentiary hearing, the district court preliminarily enjoined the City from attempting to collect the higher rates. Applying the preliminary injunction factors from Dataphase Systems, Inc. v. C L Svstems. Inc., 640 F.2d 109 (8th Cir. 1981), the court tentatively concluded, among other things, that SCF would probably prevail on the merits because the contract was a valid exercise of the City's proprietary powers.

SCF then moved for summary judgment. Reversing its previous position, the district court denied this motion and dissolved the preliminary injunction, concluding that there was no specific statutory authority for the contract, that a municipality may not contract away its legislative rate-setting power absent clear statutory authority, and therefore that the ccntract was ultra vires and void. SCF appeals the district court's dissolution of the preliminary injunction, an appealable order under 28 U.S.C. § 1292(a)(1).

Although the decision to grant or deny a preliminary injunction is generally subject to appellate review only for abuse of discretion, the parties argue legal rather than discretionary equitable issues on this appeal.[3] Both parties ask us to take up the district court's ruling that the 1968 contract is invalid, a question of law that we review de novo. See Bell v. Sellevold, 713 F.2d 1396, 1399 (8th Cir. 1983), cert. denied, 464 U.S. 1070 (1984).

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[3]During the pendency of this action, SCF has continued to pay at the Foundry Rate, but has escrowed the difference between that amount and the amount billed by the City. At one point, the City threatened to shut off SCF's power for nonpayment, but agreed in August 1990 to await a final decision on the merits, prompting the district court to deny an injunction pending appeal as unnecessary. Thus, the status quo is being effectively preserved.

II.

The parties present us with a narrow issue, whether the City in 1968 had the power to enter into a binding long-term contract specifying the rates SCF would pay for electricity purchased from the municipal distribution system. The parties agree that Nebraska law governs. South Sioux City, as a municipal corporation, has only those powers delegated to it by the State; these include powers "granted in express words; . . . those necessarily or fairly implied in or incident to the powers expressly granted; [and] those essential to the declared objects and purposes of the corporation." Jacobs v. City of Omaha, 147 N.W.2d 160, 163 (Neb. 1966).

In general, municipal powers are either legislative or proprietary. See 2 Charles Keating and Stephen Flanagan, McQuillin's Law of Municipal Corporations § 10.05 (3d ed. 1988). The distinction is important for two reasons. First, the grant of proprietary powers to act in the city's corporate capacity for the benefit of its residents "necessarily implies all the incidental powers to do anything that any business

man or corporation ought to do in operating a successful business enterprise." Nelson-Johnston & Doudna v. Metropolitan Util. Dist., 291 N.W. 558, 560-61 (Neb. 1940) (power to operate municipal electric utility includes power to sell appliances at retail). On the other hand, legislative powers are the acts of the sovereign and may only be exercised when expressly delegated by the state legislature. See Wabaska Elec. Co. v. City of Wymore, 82 N.W. 626, 627 (Neb. 1900) (municipality has no power to regulate private utility's rates absent statutory authority).

Second, and more germane to this case, while long-term contracts are a readily accepted method of exercising a municipality's proprietary powers, they are highly suspect in the legislative arena. See generally 56 Am. Jur. 2d, Municipal Corporations § 154 (2d ed. 1971). In Nebraska law, this is reflected in the axiom that, "A city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority." Seidel v. City of Seward, 133 N.W.2d 390, 392 (Neb. 1965). That axiom is the core of the

City's contention that its 1968 contract with SCF was ultra vires.

Nebraska cases have long recognized that, when a municipality enters into a long-term contract that fixes the rates at which electricity, gas, or water will be sold to its citizens, the municipality is exercising a power that may be proprietary, legislative, or both. Wabaska Elec. Co., supra, reflected the near-universal view that rate-making is a legislative function that must be expressly delegated by the State. City of University Place v. Lincoln Gas & Electric L. Co., 191 N.W. 432 (Neb. 1922), held that rate-making may be a proprietary function as well. There, the city entered into a long-term contract under which a private company constructed a gas works and sold gas in the city at prescribed rates. During the contract term, the company challenged the now-inadequate rates on the ground that the city had not been granted the power to regulate public utility rates at the time it entered into the contract. The court nevertheless upheld the contract, concluding that the power to prescribe rates was implicit in the city's proprietary power to contract for the

construction of the gas works. The court distinguished Wabaska as

> authority only upon the general proposition that a municipal corporation has no authority to exercise the governmental function of regulating rates to be charged by a public utility corporation unless expressly authorized by the Legislature, and the question there decided differs essentially from the one under discussion, which . . . involves the question of the power of the city to agree upon the charge to be made for the service for a reasonable period as a consideration for the granting of the franchise.

191 N.W. at 436 (emphasis in original).

More difficult issues of statutory construction arise when the legislature has delegated both the legislative power to fix rates, and the overlapping proprietary power to contract to buy or sell electricity. Most courts have held that these distinct governmental powers are not mutually exclusive and

therefore the contracting power to bargain on behalf of the city as buyer or seller is not extinguished or curtailed by the legislative power to regulate rates. As the Supreme Court said in St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. 352, 359-60 (1924):

> [I]n the present case . . . we think that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter "regulate and prescribe" the rates in the exercise of [its legislative] authority . . . . One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract. its power to regulate the rates durinq the period of the contract is thereby suspended, and the contract is bindinq.

(Emphasis added.) See also Vicksburg V. Vicksburg Waterworks Co., 206 U.S. 496, 515-16 (1907); Trans World

Airlines, Inc. v. City Of San Francisco, 228 F.2d 473, 477 (9th Cir. 1955), Cert. denied, 351 U.S. 919 (1956) ("the courts have recognized that the specific authority to contract, insofar as this authority conflicts with the general power conferred on the municipality to regulate public utility rates, should prevail"); Scott Paper Co. v. City of Anacortes, 578 P.2d 1292, 1297-98 (Wa. 1978). The Supreme Court of Nebraska explicity adopted this principle in City of University Place, 191 N.W. at 434 (if "the [rate] contract has the effect to suspend for a time the governmental power to regulate rates . . . this does not affect [the contract's] validity, if the time limit be reasonable, and the power to enter into the contract is found"). It was also implicitly recognized in Cornhusker Elec. Co. v. Citv Of Fairbury, 278 N.W. 379 (Neb. 1938).

We now turn to the specific Nebraska statutes that govern whether the City had the power to commit to the long-term Foundry Rate in the 1968 contract.

Nebraska is a public power State, so it is not surprising that its statutes grant cities of the first class[4] such as South Sioux City broad power "to purchase or provide for, establish, construct, extend, enlarge, maintain, operate, and regulate for the city . . . an electrical distribution facility," Neb. Rev. Stat. § 16-674, and to "do all acts necessary for the construction, completion, and management and control of same not inconsistent with law," § 16-684.[5] The City also has the general proprietary power "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers." § 16-201(4). In the absence of conflicting legislation, it is clear under Nebraska law that these statutes delegate the implied power to enter into long-term contracts with the City's

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[4]"First class" cities in Nebraska are those having between 5,000 and 100,000 inhabitants. Neb. Rev. Stat. § 16-101.

[5]See also § 18-412 (power to sell revenue bonds for this purpose); § 19-1401 ("power to purchase, construct, maintain and improve heating and lighting systems").

electricity customers that include rate terms. City of University Place, 191 N.W. at 434-35; Carr v. Fenstermacher, 228 N.W. 114 (Neb. 1929); Omaha Water Co. v. City of Omaha, 147 Fed. 1, 12-13 (8th Cir. 1906), appeal dism'd, 207 U.S. 584 (1907).

Since 1901 Nebraska cities of the first class have also been delegated the legislative authority to regulate the rates charged by both private and municipally owned electric utilities. See Neb. Rev. Stat. §§ 16-679, 16-681. The City argues that its legislative power to "regulate and fix" municipal electricity rates, § 16-681, when "the council shall by ordinance deem just or expedient," § 16-682,[6] deprived it

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[6]The City conceded at oral argument that, if the 1968 contract was within the City's powers, it is irrelevant that the council approved it by resolution rather than by ordinance. This concession reflects the principle that estoppel cannot prevent the invalidation of an ultra vires contract, but may apply to a defect that is a mere formality. Warren v. Stanton County, 15 N.W.2d 757, 761-62 (Neb. 1944).

of any power to make a long-term rate contract with SCF. We disagree.

The City's rate regulation power is conferred in two separate statutes. Section 16-679, which authorizes the regulation of rates charged by private utilities, provides in relevant part:

> The mayor and council shall have power to . . . fix the rents or rates of . . . electric light or heat . . . . These powers shall not be abridged by ordinance, resolution or contract.

(Emphasis added.) Section 16-681, which applies to municipal utilities, provides that a city "owning, operating or maintaining its own . . . light or heat system . . . . shall regulate and fix the rental or rate for . . . light or heat." However, § 16-681 does not contain the "shall not be abridged" sentence of § 16-679. Both sections were enacted in 1901 in a comprehensive statute that included the grant of broad powers to own and operate nunicipal utilities, now

§ 16-684. See 1901 Neb. Laws, ch. 18, §§ 55, 57, 59. Read in pari materia,[7] this difference between § 16-679 and § 16-681 plainly reflects the Legislature's intent to authorize a city to suspend ("abridge") its legislative rate-making power by contract when the contract is on behalf of a municipal utility, but not when the contract is between the city and a private utility.

This construction is consistent with the general principles articulated in older cases such as St. Cloud Pub. Serv. Co., 265 U.S. at 360. It is also consistent with the Nebraska Supreme Court's most recent decision on this subject, T.V. Transmission, Inc. v. City of Lincoln, 374 N.W.2d 49 (Neb. 1985). Lincoln's municipal utility sought to renege on its twenty-year contract with a cable television firm permitting

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[7]"It is a general rule that statutes pertaining to the same subject-matter should be construed together, and this is particularly so if the statutes were passed at the same session of the Legislature." Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 175 N.W. 531, 533 (Neb. 1919).

the firm to string wires on the city's utility poles for an annual rental of $3 per pole. Like South Sioux City, Lincoln argued that the contract was ultra vires because it "usurped" the statutory rate-setting authority of city officials. The Supreme Court disagreed:

> There is no claim in this case that [Lincoln] has no power to allow the use of its poles for a fee. A municipal corporation's contract is ultra vires when the corporation has no power to make the contract under any circumstances or for any purpose.
>
> [Lincoln's] argument is really not that it had no power to enter into the contract but that 20 years is too long to have to live with the same terms. In effect, [Lincoln's] argument is that in retrospect it finds it made a bad bargain.

374 N.W.2d at 54-55 (citation omitted).

South Sioux City attempts to distinguish T.V Transmission on the ground that Lincoln was setting rates for an "incidental

fee," not the delivery of electric service. However, the court in T. V. Transmission made no such distinction. Instead, it narrowly construed the axiom upon which the City relies, that "a city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority," Id. at 54. Our reading of T.V. Transmission is consistent with older Nebraska cases such as City of University Place. Together, these cases conclusively support our view that the difference between § 16-679 and § 16-681 reflects a legislative intent to grant the City power to enter into a long-term rate contract on behalf of its municipal utility.

Finally, this construction of the statutes reflects the substantive difference between rate regulation of private and municipal utilities. When a municipality fixes rates for its own system, it sits on both sides of the rate-making table. Its decisions are subject to public interest considerations that could reasonably persuade the Legislature to grant the power to enter into long-term rate contracts. For example, in 1968 the City wanted SCF to locate its new plant in South Sioux

City. As one Council member commented at the Christmas Eve 1968 meeting, "I feel if we don't make a penny even to have the industry, we're making money." SCF needed a long-term commitment of electric power at reasonable rates. The City took sophisticated steps to protect itself by enlisting help from its supplier in devising the initial rate formula, and by rewriting the complex rate-escalation clauses in the 1977 addendum. Like Lincoln in T.V. Transmission, the City's real argument here "is that in retrospect it finds it made a bad bargain." That does not make the 1968 contract ultra vires.

Accordingly, we conclude that the City's 1968 contract with SCF was not ultra vires and therefore the district court erred in dissolving the preliminary injunction on this ground. We reverse and remand the case for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2268NEL

Sioux City Foundry Company,	*
an Iowa Corporation,	*
	*
Appellant,	*
	*
vs.	*
	*
City of South Sioux City,	* Appeal from the
Nebraska, a Municipal Corporation,	* United States
	* District Court for the
	* District of Nebraska
Appellee,	*
	*
Ernest Albertsen; Keith Ferris;	*
Wayne Boyd; Don McKinney;	*
Richard Petersen; Jack Bobier;	*

Merrill Downhour; Wayne Shanks; *

Harold Pilgrim; Jerry Curry *

Frank Boeshart; Vern Larson; *

Don Lahann; Dennis Nelson, *

Third-Party Defendants. *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

July 10, 1992

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 9/17/92

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2268NEL

Sioux City Foundry Company,	*
Appellant,	* Order Denying
	* Petition for
vs.	* Rehearing and
	* Suggestion
City of South Sioux City,	* for Rehearing En
Nebraska,	* Banc
Appellee.	*

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

September 3, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit